



Probationer's Rights under Malaysian Employment Law

Written by Nurarissa Erina

EMPLOYMENT LAW

What is a Probationer?

Although the term '*probationer*' is not defined in the Industrial Relations Act 1967 ("**IRA**"), OP Malhotra in "*The Law of Industrial Disputes*" provides a detailed discussion on the legal position of probationers:

"Probation refers to a trial period, and a probationer is an employee hired to fill a permanent role but whose suitability for the position has not yet been confirmed. The assessment of a probationer's fitness for the role typically involves three key factors: job performance or productivity, conduct or discipline, and attendance. It is ultimately up to the employer to evaluate whether the probationer has met the necessary standards in these areas."

In *KC Mathews v Kumpulan Guthrie Sdn Bhd [1981] CLJ (Rep) 62*, the court held that a probationer remains in that status until formally confirmed by the employer. If, at the end of the probation period, the employer takes no action—neither confirming the employee nor terminating the employment—the individual continues to serve as a probationer. There is no automatic confirmation or termination upon expiry of the probation period unless the employment contract specifically provides otherwise.

Confirmation in Employment

According to *Paari a/l Perumal v Abdul Majid Hj Nazardin & 2 Ors [2000] 4 CLJ 127*, the High Court acknowledged that the probationer had been granted additional benefits—such as annual leave—which were typically only available to confirmed employees. The Court held that this indicated an intention on the part of the employer to treat the probationer as confirmed. Thus, the probationer was deemed to have been confirmed in employment through the employer's conduct.

Notwithstanding the above, it is standard company practice to issue a formal letter of confirmation to a probationer upon successful completion of the probation period.

Rights of a Probationer

In Malaysia, a probationer enjoys the same rights as a permanent or confirmed employees and his services cannot be terminated without just cause and excuse.

- *Section 20 of IRA*

However, a probationer is entitled to a fair assessment of their suitability. It would be unfair for an employer to terminate their employment arbitrarily without properly considering their fitness for regular employment.

- *Inter Pacific Development Sdn Bhd v Mat Juhari bin Hussei [1995] 2 ILR 85*

While a probationer is protected from being dismissed without just cause or excuse, this does not make them equal to a confirmed employee or entitle them to the same level of compensation.

- *Hartalega Sdn Bhd v Shamsul Hisham bin Moh [2004] 3 MLJ 117*

A probationer has the right to complete the fixed probationary period and to have their performance fairly assessed. It is improper for an employer to prejudge and dismiss a probationer before the probation period ends.

- *Hartalega Sdn Bhd v Shamsul Hisham bin Moh [2004] 3 MLJ 117*

Dismissal of a Probationer Without Just Cause

The Court of Appeal held that regardless of whether the dismissed employee is permanent or one on probation, industrial jurisprudence does not permit arbitrary reasons for his dismissal.

- *Bennett Subash Peter v Bon Ton Sdn Bhd (Bon Ton Resort Langkawi) [2019] 1 MLJ 326*

The *bona fide* test is crucial in assessing the dismissal of a probationer. The Industrial Court has the authority to intervene and set aside the dismissal if it is found to be motivated by discrimination or unfair labor practices.

- *Khaliah Abbas v Pesaka Capital Corporation Sdn Bhd [1997] 3 CLJ 827*



The employer must prove, on the balance of probabilities, that the probationer failed to meet expectations in terms of skill, competence, temperament, aptitude, attitude, and overall suitability for the role. In the case of *Grand Banks Yachts Sdn Bhd v Komander (B) Teng Tiung Sue [2002] 1 ILR 802*, the court laid down several procedural requirements to be complied with in managing probationers:

- Establish and clarify the standards expected from the job description, along with short- to medium-term goals to achieve. Continuous supervision and regular performance evaluations should be conducted during the probation period. Clear written instructions must be provided, indicating that actions will be taken against any neglect of the expected standards and failure to meet objectives.
- Identify specific shortcomings or areas of weakness that need to be discussed and acknowledged with the probationer.
- Conduct frequent performance reviews and appraisals.

- Offer the probationer ample opportunity, including reasonable time and resources, to enhance their performance through coaching, training, and counseling.
- If the probationer does not show improvement after these interventions, their employment may be terminated at the end of the probation period.

Remedy for Termination Without Just Cause or Excuse

The Court may order reinstatement and backwages or compensation in lieu of reinstatement and backwages.

- *V Subramaniam & Ors v Craigielea Estate [1982] 1 MLJ 317*

However, in a case of probationers, the backwages shall not exceed 12 months' backwages from the date of dismissal based on his last-drawn salary.

- *Second Schedule IRA*

Conclusion

If you are entering the professional sphere as a probationer, it is crucial to understand some key legal perspectives. Legal frameworks typically favor employees over employers, requiring employers to establish an indisputable record to justify dismissal. Employers must clearly document that a probationer did not meet job expectations during the probation period, despite being given opportunities to improve. Moreover, they must provide adequate warnings regarding the potential consequences of failing to enhance performance.

Messrs. Shankar Govinth | +603-64202928 | +6016-2738540 | office@shankargovinth.com

C-3-8, Block C, Plaza Damas, Jalan Sri Hartamas 1, Sri Hartamas, 50480 Kuala Lumpur